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Supreme Court of the United States

October Term, 1977
No. 77-1018

SYLVESTER DEL CORSO, *et al.*,
Petitioners.

vs.

ARTHUR KRAUSE, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioners (Sylvester Del Corso, *et al.*)[1] pray that a Writ of Certiorari issue to review the judgment and de-

1. Petitioners [for clarity hereinafter referred to as defendants] include the following:

a. Major General Sylvester Del Corso, Adjutant General of the Ohio National Guard.

b. Officers, including Brig. General Robert H. Canterbury, Lieutenant Colonel Charles E. Fassinger, Major Harry D. Jones, Captain John E. Martin, Captain Raymond J. Srp, Captain James R. Snyder, Lieutenant Alexander D. Stevenson, Lieutenant Howard R. Fallon, Lieutenant Dwight G. Cline.

c. Non-commissioned officers and enlisted men, including 1st SGT Myron Pryor, SFC Okey Flesher, SSG Barry Morris, SGT Lawrence Shafer, SGT Richard Love, SGT Mathew McManus, SGT (acting) William Herschler, SP4 James McGee, SP4 William Perkins, SP4 James Pierce, SP4 Lloyd Thomas, SP4 Ralph Zoller, SP4 Robert D. James, SP4 Russell Repp, Jr., SP4 Leon Smith, PFC Rodney Biddle, and PFC Larry Mowrer.

Under separate cover, Governor James A. Rhodes is filing a Petition for Writ of Certiorari.

cision of the Court of Appeals for the Sixth Circuit, which reversed the findings of the jury in the United States District Court in favor of defendants.

The basis for this Petition is that the Court of Appeals incorrectly decided questions of federal law dealing with civil litigation. These questions have not been, but should be, settled by the Supreme Court of the United States.

OPINIONS BELOW

The opinion of the Court of Appeals of the Sixth Circuit reversing the District Court is set forth in the Appendix at page A1.

The dissenting opinion of Judge Weick who wrote in favor of the Court of Appeals granting an *en banc* hearing is set forth in the Appendix at page A37.

The Memorandum and Order of the District Court in overruling plaintiffs' motion for a new trial and judgment notwithstanding the verdict is set forth in the Appendix at page A45.

JURISDICTION

1. The judgment of the Court of Appeals for the Sixth Circuit was entered on the 12th day of September, 1977, and timely motions for rehearing and hearing *en banc* were denied on the 20th day of October, 1977.

2. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

3. The jurisdiction of this Court is invoked pursuant to the provisions of Rule 19 of the United States Supreme Court (See Appendix p. A50).

QUESTIONS PRESENTED FOR REVIEW

I. Should the United States Supreme Court review the decision of the Court of Appeals for the Sixth Circuit, which is in direct conflict with the decisions of the United States Supreme Court and the Court of Appeals for the Second Circuit in the following respects:

   A. The United States Court of Appeals for the Sixth Circuit imposed a harsher standard on trial courts dealing with alleged juror threats in civil litigation than the United States Supreme Court has held should apply in criminal trials.

   B. The decision of the United States Court of Appeals for the Sixth Circuit is in direct conflict with a decision of the United States Court of Appeals for the Second Circuit, which held in a *criminal* case with facts similar to those in the present case that the appellant had waived his right to a hearing regarding an alleged threat to a juror.

II. Should the Adjutant General of a state be held liable for the actions of the National Guard taken to suppress a riot or insurrection when he has acted within the scope of his official duties, personally had no control over the individual guardsmen or their officers, and there is no evidence of bad faith on his part.

STATEMENT OF THE CASE

This cause arises out of consolidated cases[2] in which damages were sought by respondents (hereinafter referred to as plaintiffs) including nine persons injured and the personal representatives of four persons who were killed on the campus of Kent State University on May 4, 1970. Defendants were the Governor of the State of Ohio, the President of Kent State University, and individual officers and enlisted men of the Ohio National Guard.

The District Court initially dismissed the Complaints against all defendants. On appeal, the Court of Appeals for the Sixth Circuit affirmed the action of the District Court dismissing the Complaints on the grounds that defendants were entitled to immunity by reason of their official positions and that the Eleventh Amendment barred an action against the State of Ohio.

The cause was appealed to the United States Supreme Court which in *Scheuer v. Rhodes*, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974) reversed the Court of Appeals and remanded for "further proceedings, either by way of *Summary Judgment* or by Trial on the Merits," stating:

> *"We intimate no evaluation whatever as to the merits of the petitioners' claims or as to whether it will be possible to support them by proof. We only hold that* on the allegations of their respective complaints, *they were entitled to have them judicially resolved."* (416 U.S. at p. 250) (Emphasis ours)

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2. The complaints allege a cause of action under the Civil Rights Act of 1871, 42 U.S.C. §1983. Plaintiffs also allege a cause of action under the common law of the State of Ohio based on pendent jurisdiction. See *Scheuer v. Rhodes*, 416 U.S. 232 (1974) decided with *Krause, et al. v. Rhodes, et al.* All cases were consolidated for trial.

Following remand to the District Court, the claims of all plaintiffs were judicially resolved. In fact, the District Court refused to direct a verdict for any of the named defendants, submitting to the jury all issues claimed against them.

By stipulation the parties agreed that the jury would consist of twelve members and that a vote of three-quarters of their number, or nine, would be needed for a verdict to be reached. (Local Rules provided for a jury of six).

Following fifteen weeks of trial the jury received the suit. They deliberated for an additional five days before returning a verdict by a 9 to 3 vote in favor of all defendants.

On appeal by the plaintiffs, the Court of Appeals for the Sixth Circuit placed into five categories the errors claimed by plaintiffs:

"1. Lack of substantial evidence to support the verdict,

2. Violation of First Amendment rights as a matter of law,

3. Numerous errors in evidentiary and procedural rulings of the District Court,

4. Failure to deal properly with extraneous influences on the jury, and

5. Errors in the court's charge to the jury." (Court's Opinion; App., p. A3)

The Court concluded by stating:

"[T]he plaintiffs are entitled to a new trial because the verdict was returned by a jury, at least one of whose members had been threatened and assaulted during

the trial by a person interested in its outcome." (Court's Opinion; App., p. A3)

It found no error dealing with the other categories.

While the record before the Court of Appeals indicates that a juror did advise the Federal Marshal of a threat to his person, the record contains no evidence that the United States Marshal or the FBI, which also was called in to investigate the alleged threat, found or produced any evidence as to the nature of the threat, or whether in fact a threat actually had occurred.

The record contains no affidavits, statements or hearsay information to support the charge that any of the jurors (be he one of the nine voting in favor of the defendants or one of the three who refused to join in that verdict) acted out of prejudice or bias, or under duress by reason of fear, coercion or intimidation.

ARGUMENT

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IS IN DIRECT CONFLICT WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT AND THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

Defendants submit that this cause was the most publized civil case in recent American history. Plaintiffs, in one of their briefs before the Court of Appeals for the Sixth Circuit, labeled this cause *"a matter of great national importance."* (Plaintiffs' Response dated November 1, 1977).

Justice Weick in his dissenting opinion, while voting in favor of an *en banc* consideration (denied by a 4 to 3 vote), stated that "[t]*his is one of the most important cases ever to come before this Court for determination.*" He further described the case as *"unprecedented"* stating "[t]*here is no reported case wherein the governor of the state has ever been held liable in calling out the militia to suppress a riot or insurrection . . .*" (J. Weick's Opinion; App., p. A37).

In deciding this matter of great public interest the Court of Appeals for the Sixth Circuit found that the jury verdict was supported by substantial evidence. It found no error in the charge of the District Court prejudicial to plaintiffs. It stated that it was impressed with the logical presentation of the issues by the District Court and the clarity with which such issues were presented. It held as a matter of law that the First Amendment rights of the plaintiffs were not violated and would not be an issue if these matters were retried.

The Court of Appeals further found that the District Court correctly tried the cause with the sole exception of the manner in which the alleged juror threat was handled by the trial judge.

A. The United States Court of Appeals for the Sixth Circuit imposed a harsher standard on trial courts dealing with alleged juror threats in civil litigation than the United States Supreme Court has held should apply in criminal trials.

The Court of Appeals reversed the jury verdict in favor of all defendants for the reason that the District Court improperly handled an alleged threat to a single juror. In so doing, it imposed a harsher standard in deal-

ing with alleged juror threats in civil litigation than this Court held should be the rule in criminal suits. In *Remmer v. United States*, 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 654 (1954); 350 U.S. 377, 76 S. Ct. 425, 100 L. Ed. 435 (1956), a suit involving willful tax evasion, the jury foreman was told he could profit by bringing in a verdict favorable to the defendant. The incident was handled by the trial judge who informed the prosecuting attorney and requested the FBI to investigate. Defendant's attorney was unaware of the situation until after the verdict when he read about it in a newspaper story. Immediately, defendant's attorney took steps by means of supporting affidavits, to have the jury verdict set aside.

This Court stated at pages 229 and 230:

"In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant. *Mattox v. United States*, 146 U.S. 140, 148-150; *Wheaton v. United States*, 133 F.2d 522, 527.

"* * * *The trial court should not decide and take final action ex parte on information such as was received in this case, but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate.*" (emphasis added)

The case was remanded by the Supreme Court to the District Court for a hearing, *more than two years after the verdict was rendered,* to determine whether the incident complained of was prejudicial to the defendant.

In the instant suit plaintiffs' counsel were well aware of the jury threat before the case was submitted to the jury. They were not lulled into a false sense of security as occurred in the *Remmer* case, *supra.*

A portion of what occurred before the District Court is set forth in the Appendix of the Opinion of the Court of Appeals for the Sixth Circuit. While this Appendix does not contain the complete record of what happened, it sufficiently discloses that during an in-chambers conference plaintiffs' counsel were apprised of the alleged threat to a juror and that the jury was to be sequestered; further, that all jurors were to be informed of the alleged threat to the individual juror before submission of the case to them (Court's Opinion; App., pp. A20-A33).

While it is true that plaintiffs' counsel inquired of the Court as to whether the alleged threatened juror would be questioned, the issue of interrogation of the juror was abandoned by plaintiffs once the court stated it intended to dismiss the juror. Indeed, plaintiffs' counsel informed the trial court that he did not want to know the identity of the particular juror, or for which parties that juror had been pressed to vote.

The Court of Appeals in its decision states that defendants objected to dismissing the alleged threatened juror. This simply is not true. Defendants' counsel stated to the trial court that there was not sufficient information in the court's hands to determine whether the juror should be excused. Counsel for defendants further stated that they knew of no rule which would require an allegedly threat-

ened juror to be discharged as a matter of law. The trial court at this point reserved its ruling on discharging the juror. This action was taken with knowledge of all counsel and in fact the approval of plaintiffs' counsel (Court of Appeals Opinion; App., pp. A20-A33).

Following the in-chambers conference the trial court in a closed court hearing informed the jury (*with all counsel present*) of the alleged threat. It explained to the jury the reasons for his order of sequestration. *Each juror was given full opportunity to question the District Court regarding the sequestration and/or problems involving the alleged juror threat.* No juror during this question and answer period made any statement to the court that he or she was in fear of outside influence or was acting under duress or coercion. At no time did plaintiffs' counsel request further interrogation of the juror allegedly threatened or request dismissal of that juror.

The following day the jury was charged. It was then for the first time that the court determined it would not excuse the juror. Again, plaintiffs' counsel failed to request an interrogation of the juror or request that the juror be dismissed.

Neither defendants nor plaintiffs had reason to request further interrogation of the jury. There was and is no evidence that the juror allegedly threatened, or the remainder of the panel, were in any manner influenced in their deliberations by fear, coercion or intimidation.

Following the verdict the jury was polled. Not a single juror indicated that his verdict, be it for the defendants or against them, was reached by reason of coercion, intimidation or fear. Immediately after the verdict, plaintiffs' counsel cited numerous reasons in support of his oral motion for judgment in favor of plaintiffs, but failed to request that the allegedly threatened juror be interrogated.

In plaintiffs' Motion for a New Trial and Judgment Notwithstanding the Verdict plaintiffs' counsel did not request that the juror and/or jury be interrogated. Under these circumstances, it is submitted that any presumption of prejudice was rebutted by reason of the lack of evidence of outside influence during the remaining two days of the trial plus the five days of jury deliberation following the alleged threat.

Notwithstanding the posture of the record (i.e., no juror stated that his finding was reached by reason of outside influence, fear or coercion) the Court of Appeals held that "the party seeking to avoid a new trial has the burden of showing the *entire* absence of any influence on the verdict." (Court's Opinion; App., p. A9, emphasis ours).

To place this burden on the party opposing the new trial in a civil case, when all counsel were present and participated in aiding the District Court in its manner of handling the juror threat, is not only unfair but also unprecedented.

In the *Remmer* case, this Court stated that in a *criminal* case a hearing with all interested parties permitted to participate should be held following a threat to a juror. Defendants submit that in this *civil* suit such a hearing was conducted by the District Court. Further, no objection was made to the manner in which the hearing was conducted.

Assuming *arguendo,* that the hearing was not conducted in conformity with the guidelines of the *Remmer* case, defendants submit that the first occasion on which further interrogation of the jury was suggested, arose during oral argument before the Court of Appeals for the Sixth Circuit. There, defendants' counsel was asked by the Court if interrogation of the threatened juror should

not take place. Petitioners' counsel stated he had no objection if the Appellate Court deemed such action necessary. Interestingly, counsel for the plaintiffs rejected the panel's suggestion.

Defendants submit under the foregoing circumstances the burden of requesting an interrogation in a civil case should rest upon the party claiming error and not upon the party seeking to avoid a new trial. To permit the burden to be placed upon the party seeking to avoid a new trial as was done by the Court of Appeals is to place an undue burden upon that party, based solely upon *speculation* as to *possible* untoward results of the alleged threat.

The Court of Appeals should not be permitted to overturn a jury's verdict in the absence of any suggestion in the record that prejudice was apt to result, particularly where plaintiffs made no request to the trial court to conduct a more searching interrogation. Plaintiffs agreed in submitting this case to the jury as then constituted. Plaintiffs should not be permitted after an adverse decision to benefit on the appellate level from their own acquiescence in the District Court's handling of this issue.

The Court of Appeals refused to remand this cause for interrogation of the juror stating that the problem of fading memories and natural reluctance of a juror to admit improper influence would make it impossible to conclude that the threat was harmless (Court of Appeals Opinion; App., p. A12). In so finding the Court rendered ineffective the holding of the United States Supreme Court in *Remmer v. United States, supra,* wherein this Court remanded the case for a hearing more than two years after the verdict had been rendered.

Broad discretion lies with the trial court to determine whether an instance of possible juror misconduct is prejudicial to the litigants. *Mattox v. United States,* 146 U.S. 140, 147, 13 S. Ct. 50, 36 L. Ed. 917; *Wheaton v. United States,* 133 F.2d 522 (8th Cir. 1943); *United States v. Flynn,* 216 F.2d 354 (2d Cir. 1954); *Holmes v. United States,* 284 F.2d 716 (4th Cir. 1960); *Little v. United States,* 331 F.2d 287, 295 (8th Cir. 1964), *cert. denied,* 379 U.S. 834 (1964).

Further, the trial court has broad discretion in determining the "extent and nature" of a hearing to investigate allegations of juror misconduct or bias, and its decision should not be disturbed unless such discretion clearly has been abused. *United States v. Hendrix,* 549 F.2d 1225, 1227 (9th Cir. 1977); *United States v. Parker,* 549 F.2d 998 (5th Cir. 1977); *United States v. Swainson,* 548 F.2d 657 (6th Cir. 1977); *United States v. Florea,* 541 F.2d 568 (6th Cir. 1976), *cert. denied,* 97 S. Ct. 1579 (1977); *United States v. Doe,* 513 F.2d 709 (1st Cir. 1975); *Bailey v. United States,* 410 F.2d 1209 (10th Cir. 1969), *cert. denied,* 396 U.S. 933 (1969). In each of the above-cited cases in which the appellant asserted jury misconduct, the judgment of the trial court was affirmed.

In *Miller v. United States,* 403 F.2d 77 at p. 84 fn. 11 (2d Cir. 1968), the court stated:

> ". . . Where, as here, the incident was explored before submission to the jury, the trial judge's initial appraisal of the ability of the jurors to render a fair verdict in light of the objective facts should stand unless it is manifestly unreasonable, as the Court thought in *Remmer,* or significant new objective facts are developed."

In the instant case, the District Court followed the procedures set forth in *Remmer.* It held a hearing with all interested parties permitted to participate, and during which hearing the facts surrounding the alleged threat were explored prior to submission to the jury. Thus, the

District Court did not abuse its discretion in determining no further action was required, particularly when plaintiffs' counsel did not object to this ruling.

In a dissenting opinion set forth in the Sixth Circuit's order denying an *en banc* rehearing (Judges Celebrezze and Peck also favored rehearing *en banc*), Judge Weick stated:

> "The juror had apparently reported the alleged incident to a United States Marshal, and he reported it to the FBI and to the Court. The FBI interviewed the juror but made no written report. The United States Attorney was also consulted. The Judge indicated to counsel that he would excuse the juror but he never did excuse him. The Judge also reported the incident to the entire jury in open court. The FBI apparently decided to do nothing about it, which leads to the inference that the alleged threat and assault may never have taken place." (J. Weick's Opinion; App., p. A44)

In view of the above facts defendants submit that the actions of the District Court were correct in its handling of the alleged juror threat. Assuming, *arguendo,* that the District Court on its own should have conducted further interrogation, defendants urge that in this *civil* case the remedy required by this Court should be *no more drastic* than that utilized in the *Remmer* case, *supra;* namely, remanding the case to the District Court in order that a determination might be made as to whether the alleged juror threat has so prejudiced the plaintiffs as to taint the jury's verdict and require reversal, or whether it played no part in the jury's deliberation, in which case the jury verdict should be affirmed.

For these reasons this case should be reviewed by the Supreme Court of the United States.

B. The decision of the United States Court of Appeals for the Sixth Circuit is in direct conflict with a decision of the United States Court of Appeals for the Second Circuit, which held in a criminal case with facts similar to those in the present case that the appellant had waived his right to a hearing regarding an alleged threat to a juror.

Defendants submit that the plaintiffs knowingly waived their right to a recorded interrogation of the juror in the presence of all counsel.

Although litigants may be entitled to a hearing and an interrogation of a juror allegedly threatened, plaintiffs in this suit failed to request the trial court to take this action; nor did plaintiffs object or take exception to the trial court action. All counsel had full opportunity both during the in-chambers discussion and during the Court's interrogation of all jurors to request that the trial court interrogate further the juror allegedly threatened. Plaintiffs failed to ask for further interrogation or in the alternative that the juror be excused.

As set forth herein plaintiffs to date have failed to ask for further or more extensive juror interrogation, nor have they produced evidence that such further interrogation was required.

In light of the foregoing facts and circumstances, plaintiffs have waived any right to such a hearing and the verdict *must* be affirmed. *United States v. Gersh,* 328 F.2d 460 (2d Cir. 1964), *cert. denied,* 377 U.S. 992 (1964); *United States v. Dozier,* 522 F.2d 224 (2d Cir. 1975), *cert. denied,* 96 S. Ct. 461 (1975); see also, *United States v. Florea,* 541 F.2d 568 (6th Cir. 1976), *cert. denied,* 97 S. Ct. 1579 (1977).

In *United States v. Gersh,* 328 F.2d 460 (2d Cir. 1964), *cert. denied,* 377 U.S. 992 (1964), the Second Circuit Court of Appeals held (under facts similar to those here presented) that a hearing would not be directed to inquire whether the defendant-appellant had been prejudiced as a result of anonymous phone calls made to the forelady of the jury. In reaching its decision, the Court stated at p. 464:

> "Appellants have never come forward, as did the defendants in the Wheaton case, with affidavits of the forelady or of other jurors that would raise an issue of prejudice by showing that the forelady attributed the annoying calls to them. Something more than the mere fact of an unknown and here uncompleted contact with a juror is needed to call for vacating a judgment of conviction to permit a hearing which the appellants have not sought."

Rule 606 of the Federal Rules of Evidence permits a party to secure testimony or affidavits of a juror on the question whether extraneous prejudicial influence was improperly brought to the jury's attention or an outside influence improperly was brought to bear upon a juror. The record contains no such testimony or affidavits. Having failed to produce such evidence plaintiffs waived any right they might have had to raise the issue that an outside or extraneous influence did in fact exist and influenced the outcome of the case.

Defendants also submit that plaintiffs failed to comply with Rule 46 of the Federal Rules of Civil Procedure which provides that a party make known to the court the action which he desires the court to take.

Therefore, the decision of the Court of Appeals for the Sixth Circuit is in direct conflict with the Court of Appeals for the Second Circuit. Further, the Court of Appeals for the Sixth Circuit ignores the impact of Rule 606 of the Federal Rules of Evidence and Rule 46 of the Federal Rules of Civil Procedure. For these reasons this case should be reviewed by the United States Supreme Court.

II. THE ADJUTANT GENERAL OF A STATE MAY NOT BE HELD LIABLE FOR THE ACTIONS OF THE NATIONAL GUARD TAKEN TO SUPPRESS A RIOT OR INSURRECTION WHEN HE HAS ACTED WITHIN THE SCOPE OF HIS OFFICIAL DUTIES, PERSONALLY HAD NO CONTROL OVER THE INDIVIDUAL GUARDSMEN OR THEIR OFFICERS, AND THERE IS NO EVIDENCE OF BAD FAITH ON HIS PART.

This cause was remanded to the District Court to be tried pursuant to the guidelines set forth in *Scheuer v. Rhodes, supra.*

The District Court carefully followed these guidelines in the trial of this case. Under the evidence submitted to the trial court and the conclusions of law set forth by the Court of Appeals, there is no justification for resubmitting the issues relating to General Del Corso for jury determination.

The call-out of the National Guard was legally instituted. The National Guard's action in implementing the order of civilian authorities to ban rallies properly was undertaken. There was no evidence in the trial court that General Del Corso acted in bad faith in any of the decisions in which he participated.

General Del Corso was not present on the campus site on the day of the shootings and gave no commands regarding dispersal of the rally. Further, there is no evi-

dence that any order was given by any superior for the National Guard troops to fire their weapons, or that any guardsman acted upon any such order.

The Court of Appeals in its opinion found that plaintiff's counsel conceded that the Governor was justified in his decision to call out the Guard because of the violence in the City of Kent (Court of Appeals Opinion; App., p. A13).

It further held, as a matter of law, that the First Amendment rights of plaintiffs were not violated when the National Guard dispersed the assembly stating:

> "In view of the uncontradicted evidence that violence accompanied assemblies of students and young people for three consecutive days in Kent and on the campus finally subsiding at about 3:00 a.m. on May 4th, the order banning assemblies on that day did not violate the First Amendment. *Bright v. Nunn,* 488 F.2d 245, 249 (6th Cir. 1971). The motion for directed verdict on the separate claims for damages for violation of the right of peaceable assembly should have been granted. Upon another trial this claim will not be an issue." (p. A16)

The record is devoid of any evidence that the Adjutant General of the State of Ohio acted in bad faith as respects any of the allegations made by plaintiffs. On this state of the evidence, Adjutant General Del Corso was entitled to a directed verdict or a final judgment entered by the Court of Appeals by reason of the qualified immunity acknowledged by this Court in *Scheuer v. Rhodes, supra.*

The Court of Appeals in its Opinion stated "[t]hese cases essentially present the question of whether excessive force was employed in attempting to deal with a civil disturbance." (Court of Appeals Opinion; App., p. A20). Surely, General Del Corso cannot be held responsible for

the use of excessive force by any individual guardsman when he was not present and gave no orders regarding the method and manner of dispersal of the unruly crowd.

In his dissenting opinion in support of permitting a hearing *en banc* Justice Weick stated:

> "This case is unprecedented. There is no reported case wherein the Governor of a state has ever been held liable for calling out the militia to suppress a riot or insurrection, and no case where a Governor's liability has been submitted to a petit jury for determination. (J. Weick's Opinion; App., p. A40)

It is equally unprecedented to submit an Adjutant General's liability to a jury for determination on the facts of this case. Under the law pronounced by this Court and the undisputed state of the evidence in this record, General Del Corso is entitled to final judgment from the Supreme Court of the United States.

CONCLUSION

In *Scheuer v. Rhodes,* 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974), this Court set down the guidelines for the District Court, stating that the plaintiffs "were entitled to have [their claims] judicially resolved." (416 U.S. at p. 250).

This cause was returned to the District Court by the Supreme Court of the United States to be tried within its guidelines. These guidelines were carefully followed by the District Court and plaintiffs received a fair trial free of prejudicial error.

The District Court in overruling plaintiffs' elaborate and lengthy Motion for a New Trial stated:

> ". . . The collective minds and consciences of three-fourths of the twelve men and women who labored long and tearfully to reach their conclusions cannot be considered as unreasonable, or as being wrong about the verdict which they reached.
>
> * * * * *
>
> "This Court believes that the case was fairly tried, that the legal issues were correctly determined and explained to the jury, which understood and followed the Court's instructions, and that the jury's resolution of the factual issues should not be interfered with." (See Memorandum and Order of the District Court; App., pp. A47-A48)

The lengthy trial, the long jury deliberations, the fair and impartial handling of this matter by the District Court, plus the absence of evidence that the jury verdict was tainted, clearly supports defendants' claim that plaintiffs did have a fair judicial resolution of their claims as required by this Court. Rather than emasculate the jury's resolution of the issues and nullify the jury verdict guarantee contained in the VII Amendment of the Constitution of the United States, this case must be reviewed by the Supreme Court of the United States to reaffirm

the District Court's finding that the case was fairly tried and the legal issues correctly determined.

Respectfully submitted,

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